

AUSTIN E. SMITH, ASSIGNEE OF W. WALLACE WARD.

[To accompany Bill H. R. No. 851.]

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JUNE 22, 1860.

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Mr. NELSON, from the Committee on the Judiciary, made the following

**REPORT:**

*The committee to whom was referred the petition of Austin E. Smith, assignee of W. Wallace Ward, respectfully report :*

That W. Wallace Ward was duly appointed clerk of the supreme court of Washington Territory, and discharged the duties of the office from the 3d day of December, 1855, to the 3d day of December, 1856, when he resigned; that for his salary, office rent, and attendance at the sittings of the court, he made oath and was sworn to an account against the United States on the 3d day of December, 1856, showing a balance then due him of \$1,028 50; that this account was verified by Edward Lander, F. A. Chenowith, and O. B. McFadden, justices of the Territory, who certified that said Ward had well and truly performed the duties pertaining to his office, and that his account for services rendered during the year was correct and legal as therein set forth.

On the 17th of December, 1856, W. Wallace Ward, by a formal instrument, written on the back of said account and properly authenticated, transferred and assigned his claim and all right and title to and interest in the same to Austin E. Smith, who was therein and thereby authorized and empowered "to collect and receive all proceeds and moneys therefor, and to execute a receipt or other acquittance for the same. The account, so transferred, was audited at the Treasury Department on the 28th of March, 1857, and a minimum compensation at the rate of \$750 per annum allowed only from the 3d of December, 1855, to the 16th August, 1856, amounting to \$528 08, from which was deducted the sum of \$51 50 for moneys received, showing a balance, allowed at the Treasury, of \$476 58, which was duly paid to the assignee. The charges rejected by the First Auditor were \$45 for six days' attendance at the sitting of the court; \$240 for rent of office, and the salary from 16th of August, 1856, to 3d of December, 1856, both inclusive, and it is for these items, with interest, that the petitioner asks Congress to make an appropriation.

The reason for the rejection of the claim for office rent, as stated by Mr. Medill, Comptroller, in his letter to Hon. Howel Cobb, Secretary of the Treasury, under date 27th of April, 1858, was that "there is no authority in the act of February 26, 1853, for the allowance by the accounting officers of any item for rent incurred by a clerk, and no authority for allowance for such item to the United States marshal beyond the sum of \$50, unless first approved by the Secretary of the Interior in statement of estimates previously submitted to him and instructions issued in the premises. Lack of authority of law was the sole reason for the rejection of this item."

To this it may be answered, that owing to the distance between the clerk and the Secretary of the Interior, it would have been impossible to submit a previous statement of estimates in time and procure the necessary instructions as required by the act of 1853, chap. 80, sec. 2; that an office was absolutely necessary, and that as the claim was rejected, not because it was unjust or unreasonable, but for the reason that the technical requirements of the law had not been complied with, it is not only competent for but the duty of Congress to authorize an allowance which would have been authorized had the clerk been so situated as to have made a previous application.

It is further stated, in the above cited letter, that "the reason for the disallowance of Mr. Ward's claim for the minimum compensation at the rate of \$750 per annum, was that that proviso was expressly repealed by the 11th section of act of 11th of August, 1856. From the date of the approval of the act of August 16, referred to above, there was no authority of law for any allowance under proviso of 3d section of act of 1853, and the claim from Aug. 16 to Dec. 3, amounting to \$221 92 is rejected."

It may well be doubted whether the proviso in the 3d section of the act of 1853 applies at all to the Territories, as the 1st section, which would seem to declare the purpose and govern the construction of the whole act, applies alone to "the several States." There can be no question that so much of the proviso in the 3d section as relates to the increase of the clerk's compensation when the amount was less than five hundred dollars is expressly repealed by the act of 1856, chap. 124, sec. 11. It would seem that the compensation of the clerk of the supreme court of Washington Territory is regulated by the 9th section of the act entitled "An act to establish the territorial government of Washington."—(Chap. 90, 10 U. S. Stat. at Large, p. 176.) In regard to his fees of office, it is there provided that "the said clerk shall receive in all such cases the same fees which the clerks of the district courts of the Territory of Oregon receive for similar services. By the 9th section of the act to establish the territorial government of Oregon it is provided that the said clerk shall receive, in all such cases, the same fees which the clerks of the district courts of the late Wisconsin Territory received for similar services." In the act to establish the territorial government of Wisconsin, (5 U. S. Stat. at Large, p. 14,) it is provided that the said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern dis-

trict of New York receives for similar services." The northern district of New York was created by the act of 1814, chap. 49, 3 U. S. Stat. at Large, p. 49, but no special provision was made in that act either as to the clerk of the court or his compensation, and, so far as the committee has discovered there are no special provisions in relation to that particular officer, and it is supposed that his compensation, in common with that of other clerks, rests upon the act of 1792, chap. 36, sec. 3, U. S. Stat. at Large, vol. 3, p. 277, which gives to the clerk of the district courts "such fees in each *State* respectively as are allowed in the *supreme courts* of the same, and \$5 per day for his attendance on any circuit or district court, and at the rate of ten cents per mile for his expenses and time in travelling from the place of his abode to either of said courts." As there was no supreme court in Washington Territory, the mode of regulating the compensation and fees of the clerk would seem to be a *casus omissus*, though it has, doubtless, been the practice in the Territories to regulate the fees of the clerks by the acts of 1792 and 1853.

Be this as it may, there are two grounds upon which the committee do not hesitate to recommend the passage of a law allowing the claim under consideration; first, that if the act of 1853 governed the case, it was scarcely probable that, in the then state of communication between the city of Washington and the Territory of the same name, intelligence of the passage of the act of 11th of August, 1856, would reach the clerk in that distant Territory before the 3d of December, 1856, when he resigned his office, and as there is nothing to show that he did not act in good faith, it would be unjust to deprive him of the compensation upon the faith of which he acted; and secondly, as the 11th section of the act of 1853 provides that in no case shall the fees and emoluments of any clerk, above the necessary expenses of his office and necessary clerk hire included, exceed the sum of three thousand five hundred dollars per year, and thus, in some cases, allows a salary to that extent. It is believed the claim of \$1,028 50, originally asserted by the petitioner for his salary, office rent, and attendance upon the sittings of the court, is not unreasonable, and should, therefore, be allowed, subject to a deduction for the amount already paid, whether expressly provided for or not by any statute. A bill to this effect is accordingly herewith respectfully reported and its passage especially recommended, because the justices of the Territory, who were upon the spot and cognizant of the services have, as before stated, certified to the correctness of the account.

